IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

TIAA-CREF INDIVIDUAL & INSTITUTIONAL SERVICES, LLC; TIAA-CREF INVESTMENT MANAGEMENT, LLC; TEACHERS ADVISORS, INC.; TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA; and COLLEGE RETIREMENT EQUITIES FUND,	)	
Plaintiffs,	)	
v.	)	C.A. No. N14C-05-178 JRJ [CCLD]
ILLINOIS NATIONAL INSURANCE COMPANY; ACE AMERICAN INSURANCE COMPANY; ARCH INSURANCE COMPANY; and ZURICH AMERICAN INSURANCE COMPANY,	)	
Defendants.	)	

OPINION

Date Submitted: August 23, 2017
Date Decided: October 23, 2017

Upon Plaintiffs' Motion for Entry of a Final Order and Judgment Pursuant to Rule 54(b):
GRANTED, in part, and DENIED, in part.

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Jurden, P.J.

I. INTRODUCTION

Before the Court is Plaintiffs' (collectively, "TIAA-CREF") Motion for Entry of a Final Order and Judgment Pursuant to Rule 54(b).[1] TIAA-CREF's Motion seeks to resolve the remaining post-trial issues relating to TIAA-CREF's demand for coverage of its costs in defending and settling two underlying class action lawsuits against TIAA-CREF: the *Rink* Action[2] and the *Bauer-Ramazani* Action.[3]

At trial, two of TIAA-CREF's excess insurers, Defendant Zurich American Insurance Company ("Zurich") and Defendant Arch Insurance Company ("Arch"), asserted notice and consent defenses. The jury found in favor of Zurich on its notice and consent defenses and against Arch on its notice and consent defenses.[4]

Because the jury found in favor of Zurich on its notice and consent defenses, TIAA-CREF concedes that its claims against Zurich in connection with the *Rink* and *Bauer-Ramazani* Action should be dismissed.[5] As to Defendant Illinois National Insurance Company ("Illinois National"), the primary insurer, Arch, and Defendant ACE American Insurance Company ("ACE"), another excess insurer,

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[1] Plaintiffs' Memorandum of Law in Support of their Motion for Entry of a Final Order and Judgment Pursuant to Rule 54(b) ("TIAA-CREF Mot. Entry Final J.") (Trans. ID. 60199238).
[2] *Rink v. College Retirement Equities Fund*, No. 07-CI-10761 (Ky. Cir. Ct.) (Oct. 29, 2007).
[3] *Walker v. Teachers Ins. & Annuity Assoc. of Am. – College Retirement & Equities Fund, et al.*, No. 1:09-cv-00190 (D. Vt.).
[4] Special Verdict Form (Trans. ID. 59944248).
[5] TIAA-CREF Mot. Entry Final J., Ex. A [Proposed] Order and Certified Final Judgment Pursuant to Rule 54(b) ¶ 3.

the only remaining issues concern TIAA-CREF's request for entry of judgment and prejudgment interest.

For the reasons discussed below, TIAA-CREF's Motion for Entry of a Final Order and Judgment Pursuant to Rule 54(b) is **GRANTED, in part, and DENIED, in part.**

II. BACKGROUND

TIAA-CREF is a family of companies and related entities that provide various services, including certain investment and retirement accounts at issue in the *Rink* Action and the *Bauer-Ramazani* Action.[6]

A. The *Rink* Action and the *Bauer-Ramazani* Action

The *Rink* Action was brought against TIAA-CREF in 2007.[7] TIAA-CREF reported the lawsuit to its insurers for the April 1, 2007 to April 1, 2008 policy period (the "2007–08 Insurance Program").[8] Illinois National issued the primary policy in the 2007–08 Insurance Program ("Illinois National 2007–08 Primary Policy"), and multiple excess insurers, including St. Paul Mercury Insurance Company ("St. Paul Mercury"), ACE, Arch, and Zurich, issued excess policies.[9]

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[6] *TIAA-CREF Individual & Institutional Servs., LLC v. Illinois Nat'l Ins. Co.*, 2016 WL 6534271, at *1 (Del. Super. Oct. 20, 2016), *appeal refused*, 151 A.3d 899 (Del. 2016); October 20, 2016 Opinion (Trans. ID. 59726467).

[7] *Id.* at *6.

[8] *Id.*

[9] *Id.* at *4. The 2007–08 Insurance Program consists of the following policies: Illinois National Primary Policy No. 713-24-35, effective April 1, 2007–April 1, 2008; St. Paul Mercury First Excess Policy No. 5900M2632, effective April 1, 2007–April 1, 2008; ACE Second Excess

The St. Paul Mercury, ACE, Arch, and Zurich excess policies all "follow form" to the Illinois National 2007–08 Primary Policy, meaning the excess policies are subject to the same terms, exclusions, and conditions as the primary policy, except to the extent that the excess policies contain superseding or conflicting terms.[10]

In the 2007–08 Insurance Program, TIAA-CREF's primary and excess coverage was distributed, subject to a $5 million deductible, as follows:[11]

Policy	Insurer	Limit of Liability
Primary	Illinois National	$15 million
First Excess	St. Paul Mercury	$15 million
Second Excess	ACE	$15 million
Third Excess	Arch	$5 million
Fourth Excess	Zurich	$15 million

None of TIAA-CREF's insurers acknowledged coverage for the *Rink* Action.[12]

On September 6, 2012, the Kentucky Circuit Court granted final approval to the *Rink* Class Action Settlement Agreement reached by TIAA-CREF and the class

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Policy No. DOX G21667006 004, effective April 1, 2007 April 1, 2008; Arch Third Excess Policy No. ICP0014223-01, effective April 1, 2007–April 1, 2008; Zurich Fourth Excess Policy No. EOC 3864924 05, effective April 1, 2007–April 1, 2008.

[10] *TIAA-CREF*, 2016 WL 6534271, at *4 (citing provisions in the policies of the 2007–08 Insurance Program).

[11] *Id.*

[12] *Id.* at *6.

representative.[13] Shortly thereafter, on September 25, 2012, the Kentucky Circuit Court awarded class counsel in the *Rink* Action attorney's fees.[14] TIAA-CREF paid the amounts due to the *Rink* Action class members as well as the class counsel fees.[15]

The *Bauer-Ramazani* Action was brought against TIAA-CREF in 2009.[16] None of TIAA-CREF's insurers acknowledged coverage for the *Bauer-Ramazani* Action.[17] On January 31, 2014, prior to TIAA-CREF filing the instant case, TIAA-CREF entered into a proposed settlement with the *Bauer-Ramazani* class representative, and on September 3, 2014, the District Court of Vermont granted final approval of the *Bauer-Ramazani* Class Action Settlement Agreement.[18]

B. The Instant Litigation

On May 20, 2014, TIAA-CREF filed this case against Illinois National, St. Paul Mercury, ACE, Arch, and Zurich.[19] Later, TIAA-CREF sought and received

[13] *Rink* Order of Final Approval, Plaintiffs' Trial Exhibit 44.
[14] *Rink* Order Granting Class Counsel's Motion for an Award of Attorneys' Fees and Costs, Plaintiffs' Trial Exhibit 45.
[15] *TIAA-CREF*, 2016 WL 6534271, at *7.
[16] *Id.*
[17] *Id.*
[18] *Bauer-Ramazani* Order Granting Final Approval of Class Action Settlement and Final Judgment, Plaintiffs' Trial Exhibit 144.
[19] Complaint (Trans. ID. 55477629).

leave to amend its Complaint in order to, among other things, clarify its existing causes of action with regard to "related" claims.[20]

Pursuant to the Notice/Claim Reporting provision in the Illinois National 2007–08 Primary Policy, if TIAA-CREF makes a "Claim" during the 2007–08 policy period, a second or subsequent Claim "alleging, arising out of, based upon or attributable to the facts alleged in the [first] Claim" shall be considered related to the first Claim and will be deemed to be made during the 2007–08 policy period.[21] Stated differently, if the *Bauer-Ramazani* Action is related to the *Rink* Action, as that term is used in the Illinois National 2007–08 Primary Policy, coverage for the *Bauer-Ramazani* Action falls under TIAA-CREF's 2007–08 Insurance Program regardless of when the *Bauer-Ramazani* Action was brought against TIAA-CREF.

In its First Amended Complaint, TIAA-CREF pled thirteen causes of action.[22] The first through fourth causes of action apply in the event that the *Bauer-Ramazani* Action is related to the *Rink* Action, and the fifth through

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[20] Plaintiffs' Motion for Leave to File an Amended Complaint ¶ 3 (Trans. ID. 56827404); Order Granting Plaintiffs' Motion for Leave to File an Amended Complaint (Trans. ID. 56888631).
[21] *TIAA-CREF*, 2016 WL 6534271, at *13 ("[A] Claim which is subsequently made against an Insured and reported to the Insurer alleging, arising out of, based upon or attributable to the facts alleged in the Claim for which such notice has been given, or alleging any Wrongful Act which is the same as or related to any Wrongful Act alleged in the Claim of which such notice has been given, shall be considered related to the first Claim and made at the time such notice was given."); Illinois National Primary Policy No. 713-24-35, effective April 1, 2007–April 1, 2008, Plaintiffs' Trial Exhibit No. 3.
[22] First Amended Complaint ("FAC") (Trans. ID. 56897614).

thirteenth causes of action apply in the event that the *Bauer-Ramazani* Action is not related to the *Rink* Action.[23] In its October 20, 2016 Opinion, the Court determined that the *Bauer-Ramazani* Action is related to the *Rink* Action.[24] Accordingly, only the first four causes of action in the First Amended Complaint are relevant here: (1) breach of contract against Illinois National (duty to pay defense costs); (2) breach of contract against Illinois National (duty to indemnify); (3) declaratory relief against Illinois National, St. Paul Mercury, ACE, Arch, and Zurich; and (4) anticipatory breach of contract against Illinois National, St. Paul Mercury, ACE, Arch, and Zurich.[25]

With regard to anticipatory breach, TIAA-CREF pled that, "[u]pon triggering and attachment of their respective Policies," Illinois National, St. Paul Mercury, ACE, Arch, and Zurich are obligated to pay TIAA-CREF's "Loss . . . resulting from any Claim for a Wrongful Act in the performance of Professional Services, as those terms are defined in the Policies."[26] Because, according to TIAA-CREF, Illinois National "repudiated its obligations" and the excess insurers either repudiated their obligations or failed to provide TIAA-CREF

[23] *Id.* ¶¶ 116–222.
[24] *TIAA-CREF*, 2016 WL 6534271, at *13.
[25] FAC ¶¶ 116–148.
[26] *Id.* ¶ 142.

with a position as to coverage, TIAA-CREF concludes that its insurers have anticipatorily breached.[27]

C. TIAA-CREF's Motions for Partial Summary Judgment and Trial

In May 2016, TIAA-CREF filed three motions for partial summary judgment.[28] TIAA-CREF tailored its motions to discrete issues involving the availability of coverage as well as certain defenses to coverage.[29] None of TIAA-CREF's motions sought a finding of breach of contract or anticipatory breach.[30]

Following the issuance of the Court's October 20, 2016 Opinion, TIAA-CREF reached a settlement with its first excess insurer, St. Paul Mercury,[31] and TIAA-CREF, Illinois National, ACE, Arch, and Zurich jointly stipulated that Illinois National, ACE, Arch, and Zurich would withdraw the Mechanical or Electronic Failure Exclusion, a policy exclusion, as a potential defense to coverage.[32]

The parties developed discrete factual questions regarding Arch and Zurich's notice and consent defenses and the reasonableness of TIAA-CREF's defense costs for submission to the jury. In the parties' joint pretrial stipulation, the parties

[27] *Id.* ¶¶ 145–48.
[28] Trans. IDs. 59042345, 59042258, 59042327.
[29] *TIAA-CREF*, 2016 WL 6534271, at *2.
[30] *Id.*
[31] Letter Regarding Settlement Between Plaintiffs and the St. Paul Companies Defendants (Trans. ID. 59892750).
[32] Joint Stipulated Order as to the Mechanical or Electronic Failure Exclusion (Trans. ID. 59842310).

acknowledged that there remained outstanding issues in the case involving prejudgment interest, including if the attachment/exhaustion provisions of the excess policies preclude the accrual of prejudgment interest against the excess insurers.[33] The parties also stipulated that the trial would only address TIAA-CREF's claim for coverage in connection with the *Rink* and *Bauer-Ramazani* Actions, while TIAA-CREF's claim for coverage against Zurich for the *Cummings* Action, a third class action filed against TIAA-CREF, would remain outstanding.[34]

The Court held a jury trial and submitted the questions crafted by the parties to the jury. The jury was not asked to enter a verdict on TIAA-CREF's anticipatory breach claim. Following trial, TIAA-CREF filed the instant Motion for Entry of a Final Order and Judgment, seeking a final order and judgment resolving TIAA-CREF's claims for coverage of the *Rink* and *Bauer-Ramazani* Actions.[35]

D. Contract Terms Relevant to the Instant Motion

Two provisions in the relevant ACE (the "ACE Excess Policy") and Arch (the "Arch Excess Policy") policies are at issue here.[36] Both the ACE and Arch Excess Policies contain an attachment provision and a so-called "shavings" provision. The attachment and shavings provisions in each policy are substantially

[33] Pretrial Stipulation and Order at 7 (Trans. ID. 59857867).
[34] *Id.* at 23.
[35] TIAA-CREF Mot. Entry Final J. at 1.
[36] *See supra* note 9.

similar, although not identical, and the precise language of these provisions is discussed more fully in the discussion section of this Opinion.[37]

In general, the attachment provisions of the ACE and Arch Excess Policies provide that the excess insurers' coverage obligations are not triggered unless and until either: (1) the underlying insurer(s) make actual payment of the limits of liability of the underlying insurance; or (2) pursuant to an agreement with the insureds, the underlying insurer(s) make actual payment of a percentage of the limits of liability in exchange for a release of the insureds' claim.[38] The shavings provisions work in tandem with that second contingency. If the underlying insurer(s) enter into an agreement to pay the insureds less than the full limits of liability, then ACE and Arch are both entitled to reduced limits of liability on their respective policies.[39]

[37] No party has argued that the differences between the attachment and shavings provisions of the ACE and Arch Excess Policies are of any consequence to the issues in this case.
[38] The relevant terms of the ACE and Arch Excess Policies are recited *infra* pp. 18–19, 27–28.
[39] *Infra* pp. 27–28.

III. STANDARD OF REVIEW

Pursuant to Superior Court Civil Rule 54(b), "the Court may direct the entry of a final judgment upon one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."

IV. PARTIES' CONTENTIONS

In its Motion, TIAA-CREF requests that the Court enter a final order and judgment pursuant to Rule 54(b) resolving TIAA-CREF's claim for coverage with respect to the *Rink* and *Bauer-Ramazani* Actions.[10] In support of its request, TIAA-CREF notes that the Court's October 20, 2016 Opinion and the jury's verdict establish that TIAA-CREF is entitled to coverage from Illinois National, ACE, and Arch for the *Rink* and *Bauer-Ramazani* Actions under the 2007–08 Insurance Program, i.e. TIAA-CREF is entitled to declaratory judgment.[11] With respect to the entry of a money judgment and concomitant prejudgment interest, TIAA-CREF asserts that ACE and Arch "breached and/or anticipatorily breached their contracts when they issued coverage letters denying coverage . . . ."[12] Therefore, according to TIAA-CREF, it is entitled to prejudgment interest against

[10] TIAA-CREF Mot. Entry Final J. at 5.
[11] *Id.* at 9.
[12] *Id.* at 9–10.

ACE and Arch accruing from the dates TIAA-CREF incurred covered costs.[43] In the event that the Court does not award prejudgment interest against ACE and Arch, TIAA-CREF argues that the Court should award the amount TIAA-CREF claims in prejudgment interest against ACE and Arch as consequential damages against Illinois National.[44]

Illinois National, ACE, and Arch all agree that entry of a final judgment is appropriate and there is no just reason for delay.[45] However, all three filed partial oppositions to TIAA-CREF's Motion and proposed form of judgment.

ACE, the second excess insurer, maintains that, contrary to TIAA-CREF's assertion, it has not yet breached its performance obligations under the ACE Excess Policy because the attachment provision of that policy has not yet been satisfied.[46] Further, in response to TIAA-CREF's assertion that ACE anticipatorily breached its contractual obligations, ACE argues that it never "repudiated" coverage, as alleged by TIAA-CREF in the First Amended Complaint, and that it cannot now be found to have repudiated coverage in light of the unambiguous

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[43] *Id.* at 7.
[44] *Id.* at 14.
[45] Defendant ACE American Insurance Company's Memorandum in Partial Opposition to Plaintiffs' Motion for Entry of a Final Order and Judgment Pursuant to Rule 54(b) ("ACE Resp.") at 1–2 (Trans. ID. 60286772); Defendant Arch Insurance Company's Answering Brief in Partial Opposition to Plaintiffs' Motion for Entry of a Final Order and Judgment Pursuant to Rule 54(b) ("Arch Resp.") at 1 (Trans. ID. 60288442); Defendant Illinois National Insurance Company's Partial Opposition to Plaintiffs' Motion for Entry of a Final Order and Judgment Pursuant to Rule 54(b) ("Ill. Nat. Resp.") at 1 (Trans. ID. 60288741).
[46] ACE Resp. at 4–8.

terms of the attachment provision, and the accompanying shavings provision, of the ACE Excess Policy.[47] Because, according to ACE, it has neither breached nor anticipatorily breached its performance obligations under the ACE Excess Policy, ACE concludes that TIAA-CREF is not entitled to recover any prejudgment interest from ACE.[48]

Arch, the third excess insurer, echoes the substance of ACE's arguments, arguing that under the terms of the attachment provision in the Arch Excess Policy Arch's performance is not yet due and, therefore, no prejudgment interest can be accrue against Arch.[49] Arch also maintains that it has not anticipatorily breached its performance obligations.[50] While ACE takes no position on how much TIAA-CREF's settlement with St. Paul Mercury should reduce its limits of liability, Arch argues that it is entitled to a reduction that takes into account all sums, including prejudgment interest, TIAA-CREF allegedly claimed against St. Paul Mercury, rather than a reduction based on the settlement amount compared to St. Paul Mercury's limits of liability.[51]

Illinois National filed a partial opposition only to oppose TIAA-CREF's alternative request that the Court award the amount TIAA-CREF claims in prejudgment interest against ACE and Arch as consequential damages against

[47] *Id.* at 8, 13–14.
[48] *Id.* at 18.
[49] Arch Resp. at 4–7.
[50] *Id.* at 7–12.
[51] *Id.* at 16–19.

Illinois National in the event that the Court does not award prejudgment interest against ACE and Arch.[52] Illinois National argues that TIAA-CREF's entitlement to prejudgment interest is limited under the terms of New York's prejudgment interest statute to the sum awarded against Illinois National for breach of contract, not to sums due from other insurers.[53]

V. DISCUSSION

As previously explained, following the Court's determination that the *Bauer-Ramazani* Action is related to the *Rink* Action, only four causes of action remain in the case: (1) breach of contract against Illinois National (duty to pay defense costs); (2) breach of contract against Illinois National (duty to indemnify); (3) declaratory relief against Illinois National, St. Paul Mercury, ACE, Arch, and Zurich; and (4) anticipatory breach of contract against Illinois National, St. Paul Mercury, ACE, Arch, and Zurich. TIAA-CREF's settlement with St. Paul Mercury, the parties' stipulation regarding the Mechanical or Electronic Failure Exclusion, and the jury verdict in favor of Zurich further narrowed the scope of any remaining controversy between the parties. In particular, Illinois National does not dispute its obligation to pay TIAA-CREF the limits of liability under the

[52] Ill. Nat. Resp. at 3–4.
[53] *Id.* at 3.

Illinois National 2007–08 Primary Policy plus prejudgment interest on those limits.[54]

Thus, the following elements of TIAA-CREF's proposed final order and judgment are unopposed: (1) TIAA-CREF is entitled to an entry of judgment on the breach of contract claims against Illinois National;[55] (2) TIAA-CREF is entitled to recover from Illinois National the Illinois National 2007–08 Primary Policy's $15 million limit of liability plus prejudgment interest accruing through the date of entry of judgment;[56] (3) TIAA-CREF is entitled to an entry of judgment on its declaratory relief claim against Illinois National, ACE, and Arch in connection to the *Rink* and *Bauer-Ramazani* Actions;[57] and (4) TIAA-CREF's claims against Zurich in connection with the *Rink* and *Bauer-Ramazani* Actions should be dismissed with prejudice.[58]

Correspondingly, the remaining disputes regarding the form of the final judgment and order are as follows: First, whether TIAA-CREF can recover prejudgment interest from ACE and Arch; Second, if TIAA-CREF cannot recover

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[54] *Id.* at 3 n.2.
[55] *Id.* at 3.
[56] *Id.*
[57] This declaratory judgment would fully resolve TIAA-CREF's claim for declaratory relief against Illinois National, ACE, and Arch because, as established by the Court's October 20, 2016 Opinion, TIAA-CREF's covered "Loss" for the *Rink* and *Bauer-Ramazani* Actions exceeds the limits of liability of the Illinois National, ACE, and Arch policies. TIAA-CREF's outstanding *Cummings* Action claim concerns only Zurich.
[58] TIAA-CREF Mot. Entry Final J., Ex. A [Proposed] Order and Certified Final Judgment Pursuant to Rule 54(b) ¶ 3.

prejudgment interest from ACE and Arch, whether TIAA-CREF can recover prejudgment interest allegedly owed by ACE and Arch from Illinois National as consequential damages; Third, whether ACE and Arch's limits of liability should be reduced based upon: (1) the difference between TIAA-CREF's settlement amount with St. Paul Mercury and the limits of St. Paul Mercury's policy; or (2) based upon the difference between TIAA-CREF's settlement with St. Paul Mercury and TIAA-CREF's alleged claim against St. Paul Mercury (i.e. limits of liability plus prejudgment interest computed from the date covered costs were incurred by TIAA-CREF).

A. New York's Prejudgment Interest Statute

There is no dispute that New York law governs recovery of prejudgment interest in this case.[59] Section 5001(a) of the New York Civil Practice Law and Rules provides that interest "shall be recovered upon a sum awarded because of a breach of performance of a contract . . . ."[60] Section 5001(b) specifies that interest "shall be computed from the earliest ascertainable date the cause of action existed,

[59] *Cooper v. Ross & Roberts, Inc.*, 505 A.2d 1305, 1307 (Del. Super. 1986) ("The recovery of prejudgment interest in Delaware is a matter of substantive law . . . and the state whose laws govern the substantive legal questions also govern the question of prejudgment interest."). The parties agree that New York substantive law governs.

[60] N.Y. C.P.L.R. § 5001(a) ("Interest shall be recovered upon a sum awarded because of a breach of performance of a contract, or because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property, except that in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion.").

except that interest upon damages incurred thereafter shall be computed from the date incurred."

In *Love v. State*, the Court of Appeals of New York affirmed that interest "is not a penalty."[61] Rather, "it is simply the cost of having the use of another person's money for a specified period."[62] With regard to the fairness of awarding interest, the Court of Appeals explained:

> [T]he defendant, who has actually had the use of the money, has presumably used the money to its benefit and, consequently, has realized some profit, tangible or otherwise, from having it in hand during the pendency of the litigation. There is thus nothing unfair about requiring the defendant to pay over this "profit" in the form of interest to the plaintiff, the party who was entitled to the funds from the date the defendant's liability was fixed.[63]

B. Breach of Performance and Prejudgment Interest

The crux of ACE and Arch's arguments regarding time of breach, and therefore, time at which prejudgment interest begins to accrue, concerns the ACE and Arch Excess Policies' attachment and shavings provisions. The ACE Excess Policy contains the following attachment provision:

> It is expressly agreed that liability for any covered Loss shall attach to the Insurer only after
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> 1. the insurer(s) of the Underlying Policies; or

[61] 78 N.Y.2d 540, 544, 583 N.E.2d 1296 (1991); *see Aurecchione v. N.Y. State Div. of Human Rights*, 771 N.E.2d 231, 234 (N.Y. 2002) ("[I]nterest is not a punishment arbitrarily levied upon a culpable party. Instead, an award of interest is simply a means of indemnifying an aggrieved person.").
[62] *Love*, 78 N.Y.2d at 544.
[63] *Id.* at 545.

> 2. the Insureds pursuant to an agreement with the insurer(s) of the Underlying Policies
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> shall have paid . . . the full amount of the Underlying Limits . . . .[64]

The Arch Excess Policy contains a substantially similar attachment provision:

> The insurance coverage afforded by this Policy shall apply only after:
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> 1. the Insurer(s) of the Underlying Insurance, and/or
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> 2. the Insureds, either (i) pursuant to a Limit Reduction Agreement (as defined below) with the insurer(s) of the Underlying Insurance, or (ii) by reason of the financial insolvency of the insurer(s) of the Underlying Insurance,
>
> shall have paid in legal currency loss covered under the Underlying Insurance equal to the full amount of the Underlying Limit.[65]

"[I]t is well settled law that a contract is not breached until the time set for performance has expired,"[66] and the plain language of both provisions delays attachment of each policy until either actual payment of underlying limit(s) by the underlying insurer(s) or actual payment of the amount of the underlying limit(s) by the underlying insurer(s) and the insureds pursuant to a settlement agreement.

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[64] Ill. Nat. Resp., Ex. A, ACE Second Excess Policy No. DOX G21667006 004, effective April 1, 2007–April 1, 2008, Endorsement 4.A ("ACE 2007–08 Excess Policy").

[65] Arch Resp., Ex. 4, Arch Third Excess Policy No. ICP0014223-01, effective April 1, 2007–April 1, 2008, Endorsement 4.1 ("Arch 2007–08 Excess Policy"). The Arch Policy also provides for actual payment by the insured if the insurer of the underlying insurance is insolvent. *Id.* This provision is not relevant to the matters at issue.

[66] *Maryland Casualty Co. v. W.R. Grace & Co.*, 1996 WL 306372, at *1 (S.D.N.Y. June 7, 1996) (citing *Rachmani Corp. v. 9 East 96th St. Apt. Corp.*, 629 N.Y.S.2d 382, 384 (A.D. 1st Dept. 1995)).

One facet of both the actual payment by the underlying insurer(s) and the actual payment pursuant to a settlement agreement subsections is particularly relevant here. By tying attachment to actual payment, the terms of both the ACE and the Arch attachment provisions encompass at least two situations where the underlying insurer(s) have wrongfully denied coverage: (1) where the underlying insurer(s) wrongfully deny coverage for a time before acknowledging coverage and paying the limits of liability; and (2) where the underlying insurer(s) wrongfully deny coverage before settling with the insureds and paying a percentage of the limits of liability in exchange for a release. By encompassing situations where the underlying insurer(s) have wrongfully denied coverage, the effect of these attachment provisions is to permit the excess insurer to wait out good faith coverage disputes between the insured and underlying insurer(s) without risk of breaching the excess insurer's performance obligations.

In this case, the ACE and Arch Excess Policies provide that the Policies follow form to the Illinois National 2007–08 Primary Policy, meaning it is necessary for TIAA-CREF to reach a final resolution of its coverage dispute with the issuer of the primary policy—the policy that contains most of the key terms and conditions of the insurance coverage—before the ACE and Arch Excess

Policies may attach.[67] With regard to Illinois National's denial of coverage, TIAA-CREF has never pursued a claim that Illinois National (or the excess insurers by adopting Illinois National's coverage position) refused TIAA-CREF's demands for coverage in bad faith.

Beyond delineating when ACE and Arch's performance obligations become due, the attachment provisions also work in concert with the shavings provisions of the ACE and Arch Policies. As previously summarized, the shavings provisions entitle the excess insurers to reduced limits of liability in the event that TIAA-CREF settles with an underlying insurer for less than the underlying policy's limits of liability.[68] Thus, similar to the attachment provisions, the shavings provisions tie the excess insurers' performance obligations to the resolution of coverage disputes between the underlying insurer(s) and the insureds. Until the underlying insurer(s) either pay the insureds the limits of liability or agree to pay the insureds a percentage of the limits of liability in exchange for a release, the excess insurer does not know for certain whether it is (or will be) liable for the full limit of liability or for a reduced limit.

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[67] *See supra* pp. 4–5. ACE's June 11, 2013 letter to TIAA-CREF and Arch's June 7, 2013 letter to TIAA-CREF regarding the *Bauer-Ramazani* Action (which TIAA-CREF cites in support of its breach/anticipatory breach arguments) both explicitly adopt Illinois National's coverage positions. Plaintiffs' Consolidated Reply Memorandum of Law in Further Support of Their Motion For Entry of a Final Order and Judgment Pursuant to Rule 54(b) ("TIAA-CREF Reply") (Trans. ID. 60357251), Ex. A, ACE June 11, 2013 Letter to TIAA-CREF, Ex. B, Arch's June 7, 2013 Letter to TIAA-CREF.

[68] *See infra* pp. 27–28.

In addition to tying the excess insurers' performance obligations to resolution of coverage disputes between the underlying insurer(s) and the insureds, the terms of the shavings provisions, like the terms of the attachment provisions, encompass situations where the underlying insurer(s) have wrongfully denied coverage. For example, where the underlying insurer(s) have wrongfully denied coverage, but the insureds, recognizing the risks of litigation, agree to release their claim in exchange for payment of the percentage of the limits of liability. In such a case, the shavings provisions, regardless of the underlying insurer(s)' wrongful denial of coverage, explicitly confers a direct benefit to the excess insurers in the form of reduced limits of liability, a benefit that can only be realized after resolution of the coverage dispute between the underlying insurer(s) and the insureds.

Under the plain language of the attachment provisions of the ACE and Arch Excess Policies, only upon actual payment by Illinois National will ACE's performance obligations become due, whereupon ACE's actual payment will trigger Arch's performance obligations. TIAA-CREF's argument that ACE and Arch are illegitimately attempting to take advantage of Illinois National's breach of contract has considerable rhetorical force.[69] However, ACE and Arch's ability to wait out good faith coverage disputes without breaching their own performance

[69] TIAA-CREF Reply at 1–2.

obligations is a benefit conferred upon them by the terms of the attachment provisions, regardless of whether the underlying insurer(s) have wrongfully denied coverage. ACE and Arch's performance obligations have not yet been triggered, and the purposes served by prejudgment interest in other cases do not give the Court license to ignore the terms of the ACE and Arch Excess Policies or to ignore the fact the prejudgment interest statute requires that the Court award a sum for breach of performance. In light of the foregoing, the Court does not currently have a basis to enter a damages judgment against ACE and Arch for breach of contract. This fact necessarily precludes any award of prejudgment interest against ACE and Arch for breach of contract under Section 5001(a).[70]

On this point, the Court notes that TIAA-CREF never pled a breach of contract claim against ACE or Arch under the 2007–08 Insurance Program. In its First Amended Complaint, TIAA-CREF requested two forms of relief against ACE and Arch: (1) a declaration that each insurer is obligated upon the triggering and attachment of its respective policy to pay TIAA-CREF, or to pay on behalf of TIAA-CREF, the cost of TIAA-CREF's "Loss," as defined by the respective policies; and (2) if TIAA-CREF prevailed on its anticipatory breach claim, an

[70] *But cf. J.P. Morgan Sec. Inc. v. Vigilant Ins. Co.*, 2017 N.Y. Slip Op. 31690(U) (N.Y. Sup. Ct. Aug. 11, 2017) (awarding prejudgment interest when excess insurers breached their policies by wrongful disclaimer and rejecting excess insurer's argument that no award could be made due to the excess insurers' actual payment exhaustion provision).

award of compensatory and consequential damages.[71] While a sum awarded for anticipatory breach is a sum awarded for breach of performance of a contract under Section 5001(a), TIAA-CREF never asked this Court to award it summary judgment on its anticipatory breach claim, and TIAA-CREF never requested that the jury render a verdict on its anticipatory breach claim.

"An anticipatory breach of a contract by a promisor is a repudiation of [a] contractual duty before the time fixed in the contract for . . . performance has arrived."[72] TIAA-CREF argues that the Court may find anticipatory breach due to ACE and Arch's adoption of Illinois National's denial of coverage.[73] While a denial of coverage may amount to an anticipatory breach in some cases,[74] in this case, the attachment provisions and the shavings provisions of the ACE and Arch Excess Policies serve to insulate ACE and Arch from liability until TIAA-CREF has resolved its coverage dispute with the underlying insurer(s). In the coverage letters cited by TIAA-CREF in support of its repudiation argument,[75] ACE and Arch adopt Illinois National's coverage position, yet their own performance obligations will not become due until Illinois National and TIAA-CREF have

[71] FAC pp. 61–62, Prayer for Relief.
[72] *Princes Point LLC v. Muss Dev. L.L.C.*, 2017 WL 4680064 (N.Y. Oct. 19, 2017) (quoting *Corbin on Contracts* § 54.1 (2017)).
[73] TIAA-CREF Reply at 8.
[74] *See J.P. Morgan Sec. Inc. v. Vigilant Ins. Co.*, 39 N.Y.S.3d 864 (N.Y. Sup. 2016), *aff'd*, 151 A.D.3d 632, 58 N.Y.S.3d 38 (N.Y. App. Div. 2017) ("[T]he repudiation of liability by an insurer on the ground that the loss is not covered by the policy . . . .").
[75] TIAA-CREF Reply, Exs. A, B.

resolved that very coverage dispute, either through Illinois National paying its limits or liability or through settlement. Furthermore, in their letters, neither ACE nor Arch indicates that it will continue to deny coverage in the event that TIAA-CREF prevails in its coverage claim against Illinois National or in the event that Illinois National concedes the possibility of coverage through settlement.[76] Thus, TIAA-CREF's assertion that ACE and Arch's denials of coverage for *Bauer-Ramazani* constitute "a clear anticipatory breach,"[77] does not hold up given the fact that the attachment provision of the ACE and Arch Excess Policies permitted ACE and Arch to wait out coverage disputes between TIAA-CREF and the underlying insurers.[78] The Court does not find unambiguous evidence of repudiation in the record in this case that would support a finding of anticipatory breach by the Court, and therefore, the Court cannot award TIAA-CREF damages or prejudgment interest for a sum awarded.

C. Prejudgment Interest Claimed Against ACE and Arch Cannot be Awarded Against Illinois National as Consequential Damages

As TIAA-CREF admitted at oral argument, its argument that Illinois National should be liable in the form of consequential damages for prejudgment interest that would be due from ACE and Arch but for the ACE and Arch Excess

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[76] *Id.*

[77] TIAA-CREF Reply at 8.

[78] *See Princes Point LLC v. Muss Dev. L.L.C.*, 24 N.Y.S.3d 292, 296 (N.Y. App. Div. 2016) ("Whether a party has anticipatorily breached a contract is ordinarily a question of fact reserved for a jury."), *rev'd on other grounds*, 2017 WL 4680064 (N.Y. Oct. 19, 2017).

Policies' respective attachment provisions is novel, so novel that TIAA-CREF cannot identify specific authority either for or against the proposition.[79]

Contract damages in a case such as this are ordinarily limited to reimbursement of covered loss up to each policy's limits.[80] The authorities TIAA-CREF cites in support of the award of consequential damages above policy limits concern bad faith claims.[81] As previously stated, TIAA-CREF has never pursued a bad faith claim in this case. Moreover, non-accrual of prejudgment interest against ACE and Arch—a consequence of the operation of the plain terms of the attachment provisions—was a part of the bargain between TIAA-CREF and ACE and TIAA-CREF and Arch. Thus, in essence, TIAA-CREF's consequential damages argument attempts to recast a benefit of the bargain conferred upon ACE and Arch by the terms of the ACE and Arch Excess Policies as a kind of bad faith on the part of Illinois National. It is not, and the Court finds no basis to award damages against Illinois National in excess of policy limits.

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[79] March 21, 2017 Oral Argument Transcript at 9:4–10:16 (Trans. ID. 609804065).

[80] *See, e.g.*, *Gordon v. Nationwide Mut. Ins. Co.*, 285 N.E.2d 849, 854 (1972) ("For a breach of contract based only on a failure to make reasonable settlement of a claim within the policy limits, damages are measured by the policy limits. For a breach of implied conditions of the contract to act in its performance in good faith in refusing to settle within the policy limits, the damages may exceed the policy limits.").

[81] *See Panasia Estates, Inc. v. Hudson Ins. Co.*, 10 N.Y.3d 200, 203, 886 N.E.2d 135 (N.Y. 2008) ("[C]onsequential damages resulting from a breach of the covenant of good faith and fair dealing may be asserted in an insurance contract context, so long as the damages were 'within the contemplation of the parties as the probable result of a breach at the time of or prior to contracting.'" (quoting *Bi-Econ. Mkt., Inc. v. Harleysville Ins. Co. of New York*, 10 N.Y.3d 187, 192, 886 N.E.2d 127 (N.Y. 2008)); *Quincy Mut. Fire Ins. Co. v. New York Cent. Mut. Fire Ins. Co.*, 89 F. Supp. 3d 291, 313 (N.D.N.Y. 2014) (discussing damages in light of insurers bad faith settlement position).

D. The "Shavings" Provisions as Applied to TIAA-CREF's Settlement with St. Paul Mercury

Finally, with regard to the declaratory judgment that TIAA-CREF is entitled to, there remains one issue regarding the limits of liability ACE and Arch must pay upon attachment of their policies. As previously discussed, pursuant to the shavings provisions of the ACE and Arch Excess Policies, ACE and Arch are entitled to reduced limits of liability if TIAA-CREF enters into an agreement with an underlying insurer, wherein TIAA-CREF agrees to release its coverage claim against the underlying insurer in exchange for the underlying insurer paying a portion of its limit of liability. No party denies that TIAA-CREF entered into such an agreement with St. Paul Mercury. However, Arch maintains that it is entitled to a reduction based upon the difference between TIAA-CREF's settlement with St. Paul Mercury and TIAA-CREF's alleged claim against St. Paul Mercury (i.e. limits of liability plus prejudgment interest computed from the date covered costs were incurred by TIAA-CREF, rather than the difference between TIAA-CREF's settlement amount with St. Paul Mercury and the limits of St. Paul Mercury's policy).[82]

The shavings provision of the Arch Excess Policy provides:

> [I]f with respect to any covered Claim the Underlying Limit is reduced or exhausted by payment by the Insureds [pursuant to a Limit Reduction Agreement with the underlying insurer] . . . the

[82] Arch. Resp. at 16–18.

> unexhausted Limit of Liability under this Policy applicable to such Claim shall be reduced by at least the largest percentage savings of the Underlying Insurance's Limit(s) of Liability as provided in the Limit Reduction Agreements applicable to such Claim.[83]

Further, the Arch Excess Policy defines a Limit Reduction Agreement as follows:

> [A] Limit Reduction Agreement is an agreement between the Insureds and one or more insurer(s) of the Underlying Insurance pursuant to which such insurer(s) agrees to pay a portion of its unexhausted Limit of Liability in exchange for a release from the Insureds . . . .[84]

The limit of liability in the St. Paul Mercury Excess Policy is $15 million, and St. Paul Mercury settled for [redacted] million,[85] meaning TIAA-CREF released its claims against St. Paul Mercury in exchange for St. Paul Mercury paying [redacted]% of its limits of liability. The fact that TIAA-CREF may have also settled any claim for prejudgment interest against St. Paul does not change the fact that St. Paul Mercury paid [redacted]% of its limits of liability. Under the terms of the shavings provision, Arch is entitled to a [redacted]% reduction in its limits of liability.

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[83] Arch 2007–08 Excess Policy, Endorsement 4.3. The shavings provision in the ACE Excess Policy is substantially similar: "[I]n the event any insurer of an Underlying Policy reaches an agreement with the Insureds for such insurer to pay covered Loss in an amount less than such insurer's limit of liability, the Insurer of this Policy shall not be liable for any greater percentage of Loss under this Policy than such insurer of such Underlying Policy is liable for . . . ." ACE 2007–08 Excess Policy, Endorsement 4.C.

[84] Arch 2007–08 Excess Policy, Endorsement 4.4.

[85] Arch Resp. at 17.

VI. CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Entry of a Final Order and Judgment Pursuant to Rule 54(b) is **GRANTED, in part, and DENIED, in part**. The final judgment entered by the Court pursuant to Rule 54(b) is set forth in a separate Order issued contemporaneously with this Opinion.

IT IS SO ORDERED.

Jan R. Jurden, President Judge

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